Causation, Criminal Omissions and Medical Negligence: Some Doctrinal and Policy Aspects of a Common Law Approach

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Abstract

Although penal statutes differ considerably from jurisdiction to jurisdiction, it is nevertheless possible to discover on a doctrinal level significant similarities among diverse criminal justice systems, especially systems of countries belonging to the same legal family. England, New Zealand, and other common law jurisdictions have traditionally followed a bipartite structure of crime, distinguishing between objective (actus reus) and subjective (mens rea) aspects of offence definitions. While in paradigmatic cases criminal conduct will involve bodily movements, there are certain situations where liability may also arise from

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an omission or failure to act. Furthermore, a distinction is traditionally drawn between conduct crimes and result crimes. A conduct crime prohibits certain conduct regardless of its consequences; a result crime makes liability dependent on the consequences that flow from the accused's conduct. To establish liability for a result crime, it is required that the prosecution demonstrates a causal link between the accused's conduct (act or omission) and the prohibited result. This paper discusses doctrinal aspects of the law relating to causation and criminal omissions in New Zealand, with particular emphasis being placed on the issue of criminal responsibility for medical negligence. The analysis of substantive law includes consideration of the subjective and objective requirements for criminal liability as expressed in relevant legislative enactments and judicial decisions, as well as a number of practical and policy problems. The references to leading common law authorities, mainly from English law, add a useful dimension to the discussion of the issues. It is hoped that the present paper will be of value to scholars and legal professionals interested in the fields of criminal law theory, comparative criminal law, and medical criminal law.

Causation and Criminal Responsibility

It is a fundamental principle of criminal law that where an accused is charged with a result crime, the prosecution must prove that his or her conduct caused the prohibited consequence. If the prohibited result was not brought about by the accused's conduct, then criminal liability cannot be established, even if all the other elements of the *actus reus* of the offence were present and the accused possessed the requisite *mens rea*. A significant number of causation cases involve homicide as for a conviction for murder or manslaughter it is necessary for the

prosecution to prove a killing, that is, conduct by the accused that caused death.[1] Causation issues also emerge in relation to several other offences (including offences against the person and offences against property) whose definitions include words such as 'causing', 'inflicting' or 'occasioning'.[2] Where there is a dispute as to whether the accused's conduct caused the prohibited harm, it is the duty of the trial judge to direct the jury on the legal principles relating to causation. There is a range of principles that common law courts consider in assessing whether the accused caused a particular event – some are complementary, some appear to be contradictory. It is for the jury to apply these principles to the facts and decide whether the requisite causal connection between the accused's conduct and the prohibited result has been demonstrated.

Traditionally, a distinction is drawn between *factual* and *legal* causation. Factual cause is any event without which the prohibited result would not have occurred. To prove this one must show that the prohibited consequence would not have happened as and when it did, *but for* the accused's conduct. Criminal law

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[1] This requires an acceleration of normal death. In *R v Dyson* [1908] 2 KB 454, the accused inflicted injuries on a child from which the child eventually died. There was evidence that the child was suffering from meningitis and would have died anyway. This, however, was no defence to the charge. Similarly, shooting and killing a condemned man minutes before his lawful execution is still murder.

[2] While causation is most clearly in issue in crimes involving consequences of actions, it may also be of relevance with respect to offences involving only conduct. For instance, in *R v Gosney* (1971) 3 All ER 220, the defendant drove her car at night on the wrong side of a dual carriageway. She was charged with dangerous driving - an offence that does not require *mens rea* on the part of the accused. The fact that she did not mean to drive dangerously is no defence. But her defence was that she was unfamiliar with the particular road junction and that there was no sign to indicate that a right turn was prohibited. The conviction was quashed by the English Court of Appeal with Megaw LJ saying: "in order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation."

scholars say that the accused's conduct must be a *conditio sine qua non* of the prohibited consequence, or that the relevant conduct must pass the '*but for*' test.[3] However, establishing factual causation alone is not enough for criminal liability. Criminal liability requires, in addition, that an accused's conduct constituted a significant or salient or legal cause of the prohibited result. This principle is frequently expressed in a negative form: the relevant conduct must not be a minimal cause.[4] In explaining legal causation, Professor Glanville Williams says:

"When one has settled the question of 'but for' causation, the further test to be applied to the 'but for' cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The question is whether the result can fairly be said to be imputable to the defendant. ... If the term 'cause' must be used, it can best be distinguished in this meaning as the 'imputable' or 'responsible' or 'blamable' cause to indicate the value (moral) judgment involved." [5]

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[3] In *R v White* [1910] 2 KB 124, the accused put cyanide poison into his mother's drink intending to kill her. The next morning his mother was found dead sitting on a sofa with the glass containing the poisoned drink beside her. However, medical evidence showed that her death was the result of heart failure – there was no evidence that she had drunk any of the poisonous liquid. The accused was found not guilty of murder because his conduct had not caused his mother's death and thus the *actus reus* of that crime could not be established – he was convicted of attempted murder, a conduct crime. As this case shows, an accused cannot be the cause of an event if that event would have occurred without the defendant's participation. His/her conduct must be a '*sine qua non*'. Reference may also be made here to the earlier case of *R v Dalloway* (1847) 2 Cox CC 273. In this case the accused was negligently driving a cart when a child ran into the road in front of the cart and was killed. The question was whether the child would have been alive but for the driver's negligence. The court answered this question in the negative since the accident would have occurred anyway and the negligent conduct was not the cause of death. See also *R v Hensler* (1870) 11 Cox CC 570.

[4] The Latin tag runs that *'lex non curat de minimis'*: the law does not care about trifles.

[5] Williams, G., *Textbook of Criminal Law*, 2nd ed., (London: Stevens & Sons, 1983), 381.

It is recognized that the culpable act of the accused does not need to be the sole or even the main cause of the prohibited result. Other causes that contribute to the prohibited consequence may be the actions of others, or even of the victim himself or herself.[6] Nevertheless, there may be circumstances wherein a subsequent act or event supersedes or displaces an antecedent act, which would otherwise have caused the prohibited result. The new act or event that breaks the causal link between the accused's act and the prohibited result is referred to as *novus actus interveniens* (literally, new intervening act). For example, A poisons V with a slow acting poison, but before the poison takes effect another person, C, shoots and kills V. In this case, C's act is the only cause of V's death. A could only be charged with attempted murder – a conduct crime. In general, it is recognized that if the accused's conduct is the reason for the victim being at risk from a normal hazard of life but does not significantly increase that hazard, then the accused cannot be said to have caused the prohibited result.[7]

In a number of cases, the courts adopted the view that the accused's conduct

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[6] In *R v Benge* (1865) 4 F & F 504, the accused was a foreman of a group of workers who were repairing and replacing railway tracks. He had misread the train timetable and had also failed to take certain other precautions. As a result, a train was unable to stop before it reached the work area, crashed and several people were killed. The defence's argument was that the accident would not have happened but for certain other contributory negligence by railway officials. However, the court ruled that as long as the accused's negligence substantially caused the accident, it was irrelevant that the accident might have been avoided if other people had acted differently.

[7] In *Bush v Commonwealth* (1880) 78 Ky 286, the accused shot the victim who was admitted to hospital where the surgeon operating on the bullet wound somehow infected the victim with scarlet fever. Although the accused's act was the reason for the victim's presence in the hospital, it did not substantially increase his risks from ordinary disease. In reversing a conviction of murder, the court held that when death results from improper medical treatment or disease not superinduced by or resulting from the original would, the defendant would not be criminally liable. Consider also *Impress (Worcester) Ltd v Rees* [1971] 2 All ER 357.

must have contributed significantly to the result, whereas in others they stated that the relevant conduct must be more than a minimal cause of the result.[8] Whatever the terminology used, it is important to note here that the test of legal causation is not a scientific one, because what is sought from the jury is not an exact measurement, but, as Glanville Williams has noted, a 'moral reaction'. The question, in other words, is this: can the prohibited result be morally attributed to the accused? As Devlin J stated in an often-quoted case:[9]

"The law is the same for all, and what I have said to you rests simply on this: no act is murder which does not cause death. 'Cause' means nothing philosophical, or technical or scientific. It means what you twelve men and women sitting as a jury in the jury box would regard in a common-sense way as the cause."

The issue of reasonable foresight as a basis for establishing legal causation was drawn attention to in several cases. For instance, in *Pagett*[10] the defendant was besieged in a flat by armed police and sought to leave using his pregnant girlfriend as a shield. She was shot and killed by police marksmen and the defendant was convicted of manslaughter. The conviction was affirmed on appeal. The Court of Appeal pointed out that the police intervention was foreseeable, and it would be sufficient for the judge to direct the jury that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his or her conduct contributed significantly to that result. If one shoots at an armed person, one must reasonably expect them to fire back and if one is using a third

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[8] Consider, e.g., *R v Hennigan* [1971] 3 All ER 133; *R v Cato* [1976] 1 All ER 260.

[9] *R v Adams* [1957] Crim LR 365.

[10] *R v Pagett* (1983) 76 Cr App R 279.

person as a shield, then one must expect that that person will be injured in some way. Of course, in the present case the police officer's act of shooting was also a direct cause of the victim's death, but the officer was justified in returning the accused's fire.[11]

Furthermore, there have been cases where the victim, by his or her negligent conduct, contributed to his or her own death. It has been recognized that if, for instance, a victim mistreats or neglects to treat the injuries inflicted by the accused, this will not necessarily prevent the accused's being criminally liable for homicide if the victim dies.[12] In addition to that, there have been cases where the victim brought about his or her own injury or death, and this was legally attributed to the accused. This may be the case, for example, if the accused causes the victim to reasonably apprehend violence to herself, and she is injured or killed in an attempt to escape. For instance, in *Roberts*,[13] as the accused was driving the victim home from a party, he made sexual advances to her and said that he had beaten up girls who had refused him. In trying to escape, she jumped out of the moving car and was injured. The accused was convicted of an assault occasioning actual bodily harm. Stephenson LJ stated:

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[11] However, it is an interesting question, never tested in court, whether the police officer could have retreated or whether the chances of hitting the accused were so slim and the chances of hitting the victim so great, that the officer's conduct, albeit *prima facie* lawful, would still demonstrate the degree of negligence required for culpable homicide (manslaughter).

[12] In *R v Holland* (1841) 2 Mood & R 351, the accused cut the victim badly on the finger. The wound became infected, but the victim ignored the medical advice that he should have the finger amputated. Soon afterwards the victim died. In this case the judge directed the jury that it made no difference whether the wound was instantly mortal, or whether it became mortal because the victim did not accept the appropriate treatment. According to the judge, the real question is whether in the end the wound inflicted by the accused was the cause of the victim's death. The jury agreed and convicted the accused of murder.

[13] *R v Roberts* (1971) 56 Cr App R 95; [1972] CLR 27.

"The test [here] is [this]: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was doing or saying?"

Similarly, in the New Zealand case of *Tomars*[14] the defendants, the occupants of a car, gave chase to a motorcyclist who, in trying to escape, was struck and killed by another car. The question was whether the defendants caused in a legal sense the victim's death. It was held that the defendants' actions were capable of being a cause of the victim's death because the victim's conduct was reasonably foreseeable by someone in the defendants' position.[15] Such an approach to the matter invites consideration of what the reasonable person would expect to happen. This is a better test than the alternative, which would be to ask whether the victim herself acted reasonably or not. Is it prudent for a woman to jump from a moving car to avoid rape? That is a difficult question. It is easier to say that such a reaction is understandable and predictable – thus the jury should be asked to determine whether a reasonable person would have foreseen such a reaction (however unreasonable the reaction might be). If the victim's reaction is not reasonably foreseeable, then one may conclude that it constitutes a *novus actus interveniens*. Thus, the defendant should not be held liable where an unusually timorous person who over-reacts makes a wholly unnecessary escape and is killed.[16] This, however, appears to be at odds with the well-established principle,

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[14] *R v Tomars* [1978] 2 NZLR 505.

[15] In *R v Boswell* [1973] CLR 307, the victim was chased by a gang and in panic tried to escape across electrified railway tracks. He died of electrocution and the accused was convicted of manslaughter on the ground that his actions had caused the victim to try and escape and thus significantly increased the risk. Also consider *R v Mackie* [1973] 57 Cr App R 453; *R v Halliday* (1889) 61 LT 701.

[16] A great deal would depend, of course, on what the accused knew about the victim's state of

which says that the victim must be taken as he or she is found. According to this principle, an accused cannot rely of the claim that he or she was unaware that his or her victim was particularly susceptible to certain forms of physical injury, if death results. For example, if the victim suffers from haemophilia (a congenital tendency to uncontrolled bleeding), his or her death will still be attributable to the accused, even though the death may have resulted from an injury that would not have been fatal in a person of sound health. In *Master*,[17] the accused inflicted several stab wounds on the victim, which aggravated an existing condition of deep-vein thrombosis. In turn, this triggered a pulmonary embolism, from which the victim died. The accused was held to have caused the victim's death.[18]

An accused may be found criminally liable, even though he or she did not physically assault the victim, if he or she frightened the victim in such a way that a pre-existing condition got worse and resulted in death. In *Hayward*,[19] the accused had an argument with his wife and chased her from their house using violent threats. She collapsed in the road and died. Medical evidence suggested that the victim was suffering from an abnormal condition such that any combination of strong emotion and physical stress might cause death. In this case the judge directed the jury that proof of actual physical violence was not necessary. If the death from fear alone was caused by an illegal act – such as threats or violence – the accused should be found guilty of homicide. The

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mind of health in a particular case. For example, A knows that her uncle suffers from an illness that makes it necessary for him to sleep to live. If A keeps telephoning her uncle all night long until he dies, A could be found criminally liable for homicide.

[17] *R v Master* [2007] EWCA Crim 142.

[18] As Parke J stated in *R v Martin* (1832) 5 C & P 128: *"It is said that the deceased was in a bad state of health; but that is perfectly immaterial, as, if the accused was so unfortunate as to accelerate her death, he must answer for it."*

[19] *R v Hayward* (1908) 21 Cox CC 692. Also consider *R v Towers* (1874) 12 Cox CC 530.

principle that the accused must take his or her victim as he or she finds her is not limited only to consequences that result from pre-existing medical or physiological conditions. The principle has been extended to cover the victim's mental condition or his or her cultural or religious beliefs.[20]

A further question that has arisen is this: in a case where an accused inflicts an injury upon the victim, which requires medical treatment, will the accused be held liable if that treatment is improper and the victim dies? The question here, in other words, is whether the improper treatment can be said to constitute a *novus actus interveniens* that would break the chain of causation. In *Jordan*[21] the accused stabbed a man in a cafe. The victim was taken to hospital and the wound was stitched. But eight days later the victim died. At the trial, it did not occur to

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[20] In *R v Blaue* [1975] 3 All ER 446, the accused stabbed a young girl and pierced her lung. At the hospital, the victim was told that if she did not have a blood transfusion, she would die. Being a Jehovah's Witness, she refused on religious grounds and duly died from loss of blood. Medical evidence was given that the victim would not have died if she had accepted the transfusion. The defendant was convicted of manslaughter, and he appealed on the ground that the girl's refusal was unreasonable and thereby was a break of the chain of causation. The conviction was affirmed with Lawton LJ saying: "It has long been the policy of the law that those who use violence on other people must take their victims as they find them. It does not lie in the mouth of an assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of medical treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death." It may be argued that if the Court of Appeal in *Blaue* had adopted the test of 'reasonable foresight', which has been relied on in 'flight' cases, the only issue would be whether the victim's refusal of treatment was reasonably foreseeable. However, the Court of Appeal refused to use it. But if the accused raped a woman who then killed herself, is the defendant to be convicted of manslaughter? *Blaue* certainly suggests that he would be, though this is in direct contradiction to the principle adopted in *Roberts*. There must be a point at which contributory negligence, through vindictiveness, neglect, or sheer stupidity, should break the chain of causation.

[21] *R v Jordan* [1956] 40 Cr App R 152.

anybody to doubt that the stabbing was the cause of death, and the accused was found guilty of murder. At the Court of Appeal hearing, wholly exceptionally, new evidence was introduced suggesting that the victim had died, not because of the stab wound (which had healed) but because of the administration of an antibiotic (terramycin), after the victim had shown himself to be intolerant to the drug. Another contributing factor was the intravenous introduction of large quantities of liquid so that the victim developed pneumonia. The Court recognized that, if the jury had heard this evidence, they would have felt precluded from saying that they were satisfied that the death was caused by the stab wound. As a result, the accused's conviction was quashed, implying that medical maltreatment could break the chain of causation. However, no clear principle was put forward for determining when the chain of causation may be broken in such cases. Hallett J stated:

"We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to formulate the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish the causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment."

A problem, however, is that treatment that is not 'normal', is not necessarily 'palpably wrong'. In *Malcherek*,[22] *Jordan* was described as a 'very exceptional case', and the Court of Appeal expressed its preference for the position adopted in *Smith*.[23] In *Smith* the accused, a soldier, stabbed the victim twice with a bayonet in

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[22] *R v Malcherek* [1981] 2 All ER 422.

[23] *R v Smith* [1959] 2 QB 35.

the back and in the arm during a barrack room fight. The stab in the back had pierced a lung. Those who tried to carry the victim to the medical centre tripped over and dropped the victim on two occasions. At the medical station, the medical staff were under a lot of pressure treating others who had been injured in the fight and did not realize how serious the victim's condition was. One doctor gave the victim a transfusion of saline solution and, when his breathing appeared impaired, oxygen and artificial respiration. The victim finally died, and the accused was charged with murder. At the trial evidence showed that the medical staff gave the victim treatment that was thoroughly bad and might well have affected his chances of recovery. On appeal against the accused's conviction of murder, the defence counsel argued that the treatment was abnormal and that, if such treatment obstructed the victim's recovery, the death should not be attributed to the accused's actions. But the Court of Appeal affirmed the conviction for murder. As Lord Parker explained:

"If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, even though some other cause of death is also operating. ...Only if the second cause is so overwhelming as to make the original wound merely part of the history, it can be said that the death does not flow from the wound".

As this statement makes clear, if at the time of death, the original wound remains an operating and substantial cause, then the death can properly be said to be the result of the wound. Only if it can be said that the original wounding was merely the setting in which another cause operated, one might say that death did not result from the wound. In other words, if the second cause is so overwhelming as to make the original wound merely part of the history, one can say that death does not flow from the wound. Although the factual situation in *Smith* appears to

be very similar to that in *Jordan*, the two cases can be reconciled since in the latter case it was the medical treatment and not the wound, which had in the meantime healed, that caused the patient's death.

In *Cheshire*[24] the accused shot another man during an argument. The victim underwent surgery and showed signs of improvement. However, due to a condition produced because of the surgery and which remained undetected, the victim subsequently died. The accused was found guilty of murder. The Court adopted the view that, although the problem caused by the victim's treatment constituted a rare complication, it was a direct consequence of the accused's acts, which remained a significant cause of the victim's death. They accepted, in other words, that where negligent medical treatment of injuries inflicted by an accused is the immediate cause of death, the chain of causation is not broken if it is proved that the accused's acts contributed significantly to the victim's death. The accused's acts need not be the sole or main cause of death. If, on the other hand, the negligent treatment was so independent of the accused's acts, and in itself so potent in causing death that the contribution made by the acts of the accused could be regarded as insignificant, the defendant would be relieved of criminal liability.

The New Zealand case of *Kirikiri* may also be mentioned in this connection. In *Kirikiri*[25] the accused shot his wife in the hip and then bashed her about the face with a rifle. The victim was taken to hospital where a temporary tracheostomy was performed to assist her breathing. The victim was then transferred to another hospital for reconstructive surgery – a surgery that was not essential to save her life. During preparation for surgery an endo-tracheal tube used on the victim slipped down her throat and the victim died of suffocation as a result. The accused was charged with murder. The defence counsel argued that the chain of causation

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[24] *R v Cheshire* [1991] 1 WLR 844.

[25] *R v Kirikiri* [1982] 2 NZLR 648.

was broken because the improper medical treatment the victim received rendered the original injury merely a part of history. However, the accused's appeal against conviction was dismissed by the High Court. The Court adopted the view that it is a matter of fact for the jury to decide whether the original shot was of a dangerous nature and still an operating cause of death. They recognized that if the dangerous bodily injury was an operating cause of death and treatment was applied in good faith, the intervening treatment will not allow the offender to escape criminal liability.[26]

Now, imagine a case where a person attacks and seriously injures another person, whose life is sustained at a hospital by a life support machine. If the machine is switched off by a doctor, who will be criminally responsible for the victim's death? In the case of *Malcherek*, mentioned above, the defendant stabbed his wife, and she was put on a life support machine in the hospital. After extensive tests, the doctors attending the victim concluded that she was brain dead and switched off the machine. The accused was found guilty of murder and the Court of Appeal confirmed his conviction. The Court recognized that when the victim died, the defendant's act was a continuing and substantial cause and that was sufficient. The doctors' act in switching of the machine might also have been a cause of death but that was deemed to be immaterial to the issue of the defendant's liability. In this case Lord Lane stated:

"There is no evidence in the present case that, at the time of conventional death, after the life support machine was disconnected, the original wound or injury was other than a continuing, operating and indeed substantial cause of the victim's death."

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[26] See also *R v McKinnon* [1980] 2 NZLR 31.

In the New Zealand case of *Trounson*,[27] the victim of a violent attack was put on a life support machine for the sole purpose of securing organs for transplantation. When the doctors concluded that organ donation was not feasible, the life support machine was switched off and the victim died. The defence counsel argued that if the life support system were not disconnected the victim would not have occurred within a year and a day after the cause of death, as s. 162 of the New Zealand Crimes Act 1961 then required for a person to be held criminally liable for the killing of another.[28] However, this argument was rejected, and the accused was convicted of murder. The Court held that the original injury continued to be an 'effective cause' of the victim's death and that the decision to switch off the life support system did not constitute a *novus actus interveniens*. The judge in this case stated:

"We incline to view that the removal [of the life support system] did form a part of the victim's treatment in the circumstances, and was done in good faith. The decision to do so was not a new intervening cause of the victim's death. The head injuries inflicted by the accused continued throughout as an effective cause, and the accused remains criminally liable for them."

There may be situations in which one may ask whether the chain of causation is broken by a naturally occurring event. In *Hart*,[29] the accused assaulted the victim, leaving her lying unconscious on a beach below the high-water mark. The victim was subsequently drowned by the incoming tide. The Court of Appeal held that

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[27] *R v Trounson* [1991] 3 NZLR 690.

[28] Section 162 was repealed on 12 March 2019 by section 6 of the Crimes Amendment Act 2019 (2019 No 4).

[29] In *R v Hart* [1986] 2 NZLR 408.

the accused had legally caused the victim's death because the natural event that caused the death (the tide) was reasonably foreseeable. One could reasonably argue, however, that the accused would not be held liable for the victim's death had the victim been left lying above the high-water mark and had only drowned because of a freak tidal wave. Similarly, if the accused renders the victim unconscious and leaves her in a building which thereafter is blown up by a bomb planted by terrorists, the victim's death will not be legally attributed to the accused. In this case the victim was not left in a position of obvious danger, and the event that caused the victim's death was not reasonably foreseeable.[30]

As previously noted, the legal principles relating to causation apply not only to cases where the prohibited result is caused by a positive act but also to cases where the result is caused by an omission or failure to act. When it is alleged that an accused committed a result crime by omission, the prosecution must demonstrate that her failure to act constituted both a factual and legal cause of the result, as well as that she possessed the state of mind (*mens rea*) required for the

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[30] On the issue of causation in criminal law see in general: Colvin, E., "Causation in Criminal Law", (1989) 1 *Bond Law Review* 253; Honore, A. M., "Causation in the Law", *The Stanford Encyclopedia of Philosophy*, E. N. Zalta (ed.), available at http://plato.stanford.edu/entries/causation-law/ (accessed on 25 May 2021); Moore, M., *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics,* (Oxford: Oxford University Press, 2009); Salako, S. E., "Causation in Criminal Law: a new look at J*ordan, Smith , Blaue and Cheschire*", (1998) 62 *Journal of Criminal Law*, 461; Shute, S., "Causation: Foreseeability v. Natural Causes", (1992) 55 *Modern Law Review*, 584; Williams, G., "Innocent Agency and Causation", (1992) 3 *Criminal Law Forum*, 289; Wilson, W., *Central Issues in Criminal Theory,* (Oxford & Portland Oregon: Hart Publishing, 2002), 161 ff; Yeo, S., "Blamable Causation", (2000) 24 *Criminal Law Journal,* 144; "Causation, Fault and the Concurrence Principle", (2002) 10 (2) *Otago Law Review*, 213; Arenson, K. J., "Causation in the Criminal Law: A Search for Doctrinal Consistency" (1996) 20 *Criminal Law Journal*, 189; Ashby, M., "Death Causation in Palliative Medicine", in I. R. Freckelton and D. Mendelson, eds., *Causation in Law and Medicine,* (Aldershot: Ashgate Publishing, 2002), 228.

offence. It is to the issue of omission as an element of the *actus reus* of an offense that this discussion will now turn, with particular attention being paid to the relevant provisions of the New Zealand Crimes Act 1961.

Omissions as Legal Causes

While in most cases criminal conduct will involve bodily movements, there are certain situations where criminal liability may also arise from an omission or failure to act. Virtually all criminal justice systems accept that certain omissions can give rise to liability, albeit in different degrees. According to some academic commentators, omissions cannot be regarded as causes.[31] This approach to the matter is based on the idea that non-events, such as a failure to rescue a drowning person, cannot bring things about; they are simply failures to prevent. To some extent, this seems to be true. Omissions do not initiate causal processes; instead, they allow other causal processes to bring about some form of harm. In this respect, one might perhaps say that omissions are not real events in themselves. Rather, they are counterfactuals: they describe acts that did not occur. Nevertheless, neither ordinary language nor the law has much compunction about assigning causal responsibility for omissions. This is not unrelated to the point made earlier that causation in the domain of law is intimately connected with the process of ascribing responsibility for the *actus reus*. In law, responsibility for the consequences of omissions is based on a twofold test. A person is normally

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[31] See, e.g., Moore, M., *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford: Clarendon Press, 1993), 267 ff; Husak, D., *Philosophy of Criminal Law* (Totowa, NJ: Rowman & Littlefield, 1987), ch. 6; Fletcher, G., "On the Moral Irrelevance of Bodily Movements", (1994) 142 *University of Pennsylvania Law Review* 1443.

considered legally responsible for the consequences of an omission when: (a) he or she has a duty to prevent those consequences from occurring, and (b) his or her failure to act or intervene made a difference – in other words, if he or she had acted, his or her act would have made a difference, i.e., it would have prevented certain harm from occurring. With respect to omissions, because of their counterfactual nature, the causal test would usually be satisfied by proof of 'but for' causation. To put it otherwise, one could say that a person's omission causes a certain result if, but for that omission, the result would not have occurred. If the result would have occurred anyway, then the person's omission made no difference and hence he or she cannot be held causally responsible for that result.

Liability for omissions always presupposes that the perpetrator in question violated a duty of care. The legislator is of course free to enshrine duties of care, requiring action, in specific statutory enactments. In the economic or the regulatory domain, this happens frequently. Statutes may, for example, require economic actors to behave in a certain way to assure the highest possible product safety or to protect the natural environment. The paradigmatic case of statutory duties of care can be found in the so-called 'Good Samaritan' or 'easy rescue' statutes. For example, Section 323c of the German Criminal Code imposes criminal liability for the failure to render assistance during accidents, common danger, or emergency. Similarly, Section 450 of the Dutch Criminal Code imposes punishment on a person who fails to take steps that he or she could take without danger to himself or herself to save another from death. Academic commentators have argued that such easy rescue statutes intrude too far into the personal autonomy and liberty of the citizen and should therefore be resisted. This is the prevailing view in common law systems, where a failure to render aid cannot give rise to liability.[32]

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[32] See on this issue Simester, A., "Why Omissions are Special" (1995) 1 (3) *Legal Theory* 311.

Common law jurisdictions have consistently refused to accept an omission or failure to act as a general basis for criminal liability. In 1877, James Fitzjames Stephen, in his *Digest of the Criminal Law*, gave us the classic example of the passer-by who sees a child drowning in a shallow pool. He can easily stretch out a hand to rescue the child but does not and the child drowns. The passer-by commits no criminal offence – as a rule, we have no obligation to play the Good Samaritan to people in peril.[33] Several scholars have proposed the introduction of such a general duty, especially in cases of homicide, arguing that the interference with individual liberty that is involved in compelling a person to act to save another is offset by the overall good of saving human life. Against this, it has been argued that there is a pragmatic problem of causation – it is much more difficult to show that someone's inactivity causes harm than that positive conduct has such an effect. The causal link here becomes more remote, but one might argue that it is ultimately a test of proximity and predictability and surely these are issues that can be left to the jury. However, the law's position is that it is only where there is a particular or special duty to act, rather than an undifferentiated general duty, that the causal link between omission and harm becomes immediate. Over time, a variety of duties have been created largely by case law. Although these duties are manifold and the terminology in which they are framed slightly differs from country to country, they can nevertheless be classified in the following way: (a) duties imposed on a person in a special relationship to the victim – the common

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There is philosophical controversy on whether the distinction between act and omission is morally significant. One might observe, however, that positive acts are usually taken to demonstrate a greater level of hostility than do omissions. Omissions or failures to act are often incidental to an individual's practical deliberations; they manifest a different and lesser moral fault or blameworthy state rather than malice.

[33] James Fitzjames, S., *A Digest of the Criminal Law (Crimes and Punishments)* (London: Macmillan & Co, 1877), 154.

law imposes a duty of care where there is a family relationship, especially between parents and children as well as spouses;[34] (b) duties assumed by conduct – the common law will imply a duty where a person has voluntarily undertaken the care of another who is unable to care for himself or herself;[35] (c) duties assumed under

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[34] For example, in *R v Downes* (1875) 13 Cox CC 111, a father was a member of a religious sect known as the Peculiar People, who believed in the power of prayer rather than in orthodox medicine. He failed to call a doctor for his sick child who died. The father was convicted of the child's manslaughter. In *R v Gibbins and Proctor* (1918) 13 Cr. Ap. R. 134, a man and the woman he was living with did not provide any food to the man's child for several days, and the child starved to death as a result. Both the man and his partner were convicted of murder – the man because he breached his duty as a parent to provide the necessaries of life for his child, and his partner because it was accepted that, by living with the man and taking money to buy food, she had undertaken a duty towards the child. In *R v Russell [1933] VLR 59*, the accused's wife had drowned herself and their children in the accused's presence. The accused was found guilty of manslaughter for the death not only of the children but also of his wife.

[35] In *R v Instan* [1893] 1 QB 450, the accused, who did not have a regular income, lived with her aunt, and appears to have been maintained by her aunt's money. The aunt (73) became seriously ill (she developed gangrene in her leg) and was unable to care for herself or to call for help. Although the accused was fully aware of her aunt's plight, she gave her no food nor sought medical assistance, but continued to live with her as if nothing had happened. The aunt died and the accused was convicted of manslaughter. The court recognized that, by remaining with her aunt, the accused had assumed a legal duty to care for her. The principle adopted in *Instan* was extended in the later case of *R v Stone and Dobinson* [1977] 1 QB 354. In this case the two defendants lived together, and Stone's sister came to the house as a lodger. Stone's sister was eccentric and suffering from anorexia. Although initially she was able to look after herself, her condition gradually got worse and finally she was confined to bed. At that time, she was 67 years old, partially deaf, and nearly blind but was unwilling to let the defendants do anything. The defendants gave her such little food as she required and, when she became very ill, tried to summon her personal doctor, but failed. A neighbor was also unsuccessful in getting a local doctor to see her. Stone's sister finally died, and Stone and his partner were charged with manslaughter. They were found guilty of that offence and their convictions were upheld by the Court of Appeal. The Court adopted the view that, as the victim was a blood relative and a lodger and also because of the minimal attention the defendants had given to her, a legal duty of care had been cast upon the defendants and assumed by them. The Court

contract – many people, whether at the workplace or otherwise, are subject to particular duties flowing from their professional status (for instance, different duties might apply to police officers, building contractors, managers, or doctors);[36] (d) duties based on ownership or on responsibility for a source of danger – under this category fall cases where ownership or responsibility for a source of danger

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also held that the victim died because the defendants had been grossly negligent in carrying out that duty. This case invites one to consider not just when a legal duty arises but also to what standard it must be carried out. The defendants here were clearly hopeless - they tried to find the victim's doctor but went to the wrong village; they could not handle the telephone; they spent every night in the pub; and were clearly intimidated by the victim's refusal to let them help her in any way. Yet they were judged, not by whether they were doing their inadequate best, but almost by the standards of an efficient social worker! The principle adopted in *Stone and Dobinson* was extended in the Australian case of *R v Taktak* (1988) 14 NSWLR 226 to a victim who was not a blood relative and in relation to a causal one-off meeting. In this case the accused had taken a woman of short casual acquaintance who was suffering from a drug overdose from a public area to a private place where she died sometime later. The accused was found guilty of manslaughter. It was held that the accused had caused the death of the victim who was helpless as he had voluntarily assumed the care of her and secluded her thus making it impossible for others to render or obtained aid for her. It was held, moreover, that if a person chooses to undertake the care of a helpless human being, whether a blood relative or not, that person is bound to carry out that duty without gross ('wicked') negligence.

[36] The level of care required from this class of persons is usually considerably high. Taking into consideration their training and skill, they are expected to react swiftly and diligently to prevent the occurrence of harm. In *R v Pittwood* (1902) 19 TLR 37, the accused was employed as a gatekeeper by a railway company. His job was to keep the gate shut whenever a train was passing along the line. He opened the gate to let a vehicle pass but forgot to shut it before going for his lunch break. As a result, a horse and cart crossing the line was hit by a passing train and a person was killed. The accused argued that he was under no legal duty to the deceased. However, the court held that such duty arose under his contract of employment and, therefore, his failure to perform this duty could constitute the *actus reus* of homicide (manslaughter). Also consider *R v Dytham* [1979] QB 722.

can give rise to a duty of care;[37] and, (e) duties based on the creation of a dangerous situation – it is a generally accepted principle of law that one is under a duty to prevent harm that might be caused by prior conduct that created a source of risk or danger.[38]

Professor George Fletcher draws a distinction between two forms of criminal liability for omissions.[39] The first form of liability is imposed for the breach of a statutory obligation to do something under certain circumstances. This relates to conduct crimes, i.e., crimes that do not require the occurrence of harm. Various statutes impose duties to act in specified circumstances. An individual who finds himself/herself in the specified circumstances and who fails to perform the relevant duty commits and offence, and this irrespective of whether certain harm occurs as a result.[40] The second form of liability for omissions relates to result

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[37] For example, a homeowner, landlord or occupant can be under a duty of care if due to circumstances protected legal interests are endangered in the spatial sphere of a lodging.

[38] For example, if a construction worker digs a hole and fails to take appropriate safety measures to avoid that somebody else will fall in and get injured, the worker may incur liability for causing bodily harm by omission, provided the required *mens rea* can also be established. This last case differs from the above-mentioned duties based on the responsibility for a source of danger. Here, the law requires that a legal interest is 'rescued' from an imminent danger caused by the perpetrator's conduct, rather than imposing a general duty to maintain safety. In *R v Miller* [1983] 2 AC 161, the defendant was a vagrant squatting in a house owned by a housing association. After spending the evening out drinking, he returned to the house, went to a bedroom, lay down, lit a cigarette and went to sleep. He awoke to find the mattress alight and smouldering but took no steps to extinguish the fire – he simply moved to sleep in an adjoining room. Eventually the whole house caught fire and was extensively damaged. The defendant was charged with arson under s 1 (1) and (3) of the Criminal Damage Act 1971. The House of Lords held that, having created the dangerous situation, there arose a duty on the defendant to prevent further harm. The defendant was therefore liable for his omission to take any steps to put out the fire or seek help and was accordingly found guilty of the offence.

[39] Fletcher, G., *Rethinking Criminal Law*, (Oxford: Oxford University Press 2000), 420 ff.

[40] For example, s 60 of the New Zealand *Land Transport Act 1998 No 110* (as at 1 December

crimes. Here criminal liability is imposed for failing to act, to intervene to prevent the occurrence of harm, such as death or bodily injury.

As previously noted, it has long been recognized that duties to act arise from family and domestic relationships. Parents have, for instance, a duty to protect their children from harm, and spouses are under an obligation to care for each other. In New Zealand, s. 152 of the Crimes Act 1961 provides:

Every one who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty—

(a) to provide that child with necessaries; and

(b) to take reasonable steps to protect that child from injury.

In the New Zealand case of *Witika*[41] it was recognized that a parent will be criminally liable if he or she permits another person to inflict fatal injuries upon his or her child when he or she is a position to stop the aggressor. In this case the Court of Appeal adopted the position that such a parent would be party to a culpable homicide if, by not intervening, he or she encouraged the principal offender. In *Lunt*[42] it was held that a parent can be liable for culpable homicide if he or she omitted to take reasonable steps to discharge the legal duty to protect his or her child from the illegal violence of another person where that violence is foreseen or is reasonably foreseeable.

A duty to act – to provide the necessaries of life – may also arise where a person

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2009) provides that a person commits an offence if the person fails or refuses to permit a blood specimen to be taken after having been required to do so by an enforcement officer. Similarly, s 25 of the English *Road Traffic Act 1972* criminalizes failure to stop after a traffic accident.

[41] *R v Witika* [1993] 2 NZLR 424.

[42] *R v Lunt* [2004] 1 NZLR 498.

has voluntarily undertaken the care of another who is unable to care for him/herself. This will be more easily implied where the defendant is related to the victim or if there is any suggestion of remuneration. The relevant section in the Crimes Act 1961 is s 151:

Every one who has actual care or charge of a person who is a vulnerable adult and who is unable to provide himself or herself with necessaries is under a legal duty—

(a) to provide that person with necessaries; and

(b) to take reasonable steps to protect that person from injury.

With respect to the duties of care provided for by ss 151-152, the courts have adopted the view that the causal impact of the accused's failure to act must be substantial.[43] The term 'necessaries' in these sections is understood to include commodities and services, such as food, clothing, housing, and medical care – things that are necessary to sustain life, raise a child or care for a vulnerable adult. The scope of the relevant obligation will depend on factors such as the age, physical and mental capacities of the child and the nature and degree of vulnerability of the adult under care.

One may ask: can a person who is under a duty to care for another be released from that duty by the person to whom the duty is owed? For example, if the person under care wishes to die and does not want medical attention, will the carer be criminally liable if he or she fails to seek medical assistance? This was the problem in the English case of *Smith*.[44] In this case the defendant had a wife who

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[43] See, e.g., *R v Kuka* [2009] NZCA 572 at 30 & 33. Also consider *Mahomed v R* [2010] NZCA 419 & NZSC 127.

[44] *R v Smith* [1979] Crim. LR 251.

was averse to hospitals. She refused to go to hospital for the birth of her third child and the baby was stillborn and its body kept at the house. The wife became ill but refused to allow the defendant to call a doctor. Eventually a doctor arrived but the wife died - there was evidence that she might have been saved if the medical help had arrived a day or so earlier. The husband was charged with manslaughter. The judge directed the jury "to balance the weight that it is right to give to the [victim's] wish [e.g., not to seek medical help] against her capacity to make rational decisions [in the circumstances]. [If she appears to be capable to make rational decisions] it may be reasonable to abide by her wishes. On the other hand, if she appears desperately ill [and hence unable to exercise reason], then whatever she may say it might be right to override". According to this approach to the matter, if the person under care is capable of making rational decisions, then he or she may release the carer from his or her duty. However, in this case the jury could not agree on the charge of manslaughter and were discharged from giving a verdict. The question whether a person under care can release the carer from his or her duty remains a controversial one.

Reasonable duties of care arise also by virtue of undertaking certain activities that are likely to endanger life. Section 155 of the Crimes Act states:

Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

Section 156 of the Crimes Act provides:

Every one who has in his charge or under his control anything whatever,

whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

Finally, s 157 states:

Every one who undertakes to do any act the omission to do which is or may be dangerous to life is under a legal duty to do that act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

Concerning the standard of care required for persons under legal duties, the New Zealand Court of Appeal has long declined to read a requirement of 'gross negligence' into the relevant provisions. However, the situation changed following the amendment of the Crimes Act 1961 by the Crimes Amendment Act 1997, which inserted the following provision:

s 150A. *(1) This section applies in respect of the legal duties specified in any of the sections 151, 152, 153, 155, 156 and 157.*

(2) For the purposes of this Part, a person is criminally responsible for omitting to discharge or perform a legal duty ... to which this section applies only if, in the circumstances, the omission ... is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies...

Most of the cases discussed so far have been concerned with duties arising from a wide-ranging responsibility for another person's welfare. Such duties are general

in nature, with the result that criminal law theory treats omissions like actions for most purposes. A more complex relationship is that between a medical professional and his or her patient. The duty arising from such relationship is a confined one – it applies only to the patients in a doctor's care. In such cases, death or bodily injury resulting from a doctor's failure to provide proper care is regarded by the criminal law just as it were caused by an act of improper or negligent medical treatment. In New Zealand, prosecutions of negligent health professionals have largely relied on section 155,[45] although in some cases the prosecution might have relied on section 156. In section 155 the qualification "except in case of necessity" is particularly important. As the New Zealand Court of Appeal has noted: "That exception is plainly intended to cover the case of persons unqualified or insufficiently qualified who in emergencies undertake surgical or medical treatment or the like. It is not intended to emancipate a professional medical practitioner from the exercise of reasonable professional care and skill in an emergency."[46] The court recognized that instant decisions have to be taken in an emergency, and that this is a major factor which must be kept in mind when determining whether there has been a failure to live up to the appropriate professional standard.[47]

It should be noted here that sections 155 and 156 do not provide penalties for their breach; they only serve as the basis for a range of criminal offences, depending on whether death, injury, or endangerment results from the accused's actions.[48]

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[45] Although s 155 applies specifically to the administration of medical treatment, it also extends to 'any other lawful act' which may be dangerous to life (e.g., running a bungee-jumping operation).

[46] *R v Yogasakaran* [1990] NZLR 399, 404.

[47] Idem.

[48] On the issue of criminal liability for omissions see in general: Alexander, L., "Criminal

Omissions, Medical Negligence and Criminal Liability

As previously noted, where a person's conduct (in the form of an act or omission) is taken to constitute the *actus reus* of an offence that person will be found guilty only if he or she had the necessary mens rea – the blameworthy or culpable state of mind – required for that offence at the time he or she acted. *Mens rea* must not be confused with motive – it is irrelevant whether the defendant had

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Liability for Omissions - An Inventory of Issues", in S. Shute & A. Simester (eds.), *Criminal Law Theory - Doctrines of the General Part* (New York: Oxford University Press, 2002), 121; Altman, A., "Concepts of Omission", (2005) 11 *Legal Theory* 251; Ashworth, A., *Principles of Criminal Law*, 2nd ed., (Oxford: Clarendon Press, 1995), 107 ff; "Public Duties and Criminal Omissions: Some Unresolved Questions", (2011) 1 *Journal of Commonwealth Criminal Law* 1; Corrado, M., "Is there an act requirement in the Criminal Law?", (1994) 142 *University of Pennsylvania Law Review* 1529; Dressler, J., Understanding Criminal Law, 2nd ed., (New York: Matthew Bender, 1995) 86 ff; Elliott, C., "Liability for Manslaughter by Omissions: Don't Let the Baby Drown!", (2010) 74 (2) *Journal of Criminal Law* 163; Feinberg, J., *The Moral Limits of the Criminal Law, volume One, Harm to Others,* (New York: Oxford University Press), chapter 4; Fischer, D. A., "Causation in fact in Omission Cases" [1992] *Utah Law Review* 1335; Fletcher, G. P., *Basic Concepts of Criminal Law*, (New York and Oxford: Oxford University Press, 1998), at pp. 45-50, 56-57, 67-69 and 73; France, S., "The Law of Omissions - Proposals for Reform" (1992) 7 *Otago Law Review* 625; Griffin, L., " 'Which One of You Did It?' Criminal Liability for 'Causing or Allowing' the Death of a Child", (2004-2005) 15 *Indiana International & Comparative Law Review* 89; Herring, J., "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?", [2007] *The Criminal Law Review* 923; Husak, D. N., *Philosophy of Criminal Law*, (Totowa, New Jersey: Rowman & Littlefield, 1987) chapter 6; Kadish, S. H. & S. J. Schulhofer, *Criminal Law and Its Processes - Cases and Materials*, 5th ed., (Boston: Little, Brown, 1989) 198 ff; Mathis, S., "A Plea for Omissions", (2003) 22 (2) *Criminal Justice Ethics* 15; Thomson, J. J., "Causation: Omissions", (2003) 66 (1) *Philosophy and Phenomenological Research* 81; Williams, G., "Criminal Omission - The Conventional View", (1991) 107 *Law Quarterly Review* 86; *Textbook of Criminal Law*, 2nd ed., (London: Stevens & Sons, 1983) pp. 148-153, 262-268 and 346-350; Wilson, W., *Central Issues in Criminal Theory*, (Oxford, England & Portland, Oregon: Hart Publishing, 2002) chapter 3.

a good or bad motive. By motive, we mean the ulterior reason why a defendant acted in a particular way.

As with *actus reus*, to determine what state of mind (*mens rea*) is required for a particular offence, one must examine the legal definition of that offence in the relevant statutory enactment. Words used in offence definitions that are taken to express the *mens rea* element include: intentionally, recklessly, knowingly, willfully, maliciously, fraudulently, carelessly, inadvertently and others. All these words may be reduced into three general categories: *intention*, *recklessness* and, *negligence*. Depending on the particular offence committed, proof of any one of these three states of mind will make an accused criminally liable – provided, of course, that all the elements of the *actus reus* of the relevant offence can also be established.

Many offences, including murder, criminal attempts and many other offences, require intent as an essential part of their definition. The fundamental idea here is that the defendant's purpose in his or her acts is to bring about the specific prohibited result. Intention is the most difficult state of mind to prove because it requires establishing the actual, subjective state of mind of the accused. Recklessness is a blameworthy state of mind falling short of intention. A reckless person is one who knows that what he or she is doing involves an unjustifiable risk of harm and nevertheless decides to go ahead. E.g., a person knows that it is dangerous to light a fire near a forest in a windy summer day but decides to ignore the risk and do so. Here the person does not want the harm to occur, nor does he or she foresee that it will necessarily occur, but he or she is indifferent as to the obvious risk of harm his or her actions involve.[49]

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[49] In *Halsbury's Laws* (4th ed., vol. 11, para 14) we find the following definition of recklessness: "Recklessness connotes awareness or realization of a risk that certain conduct may cause the elements of a crime, and that the risk is one which in all the circumstances is unreasonable or

Mens rea, as it has traditionally been understood, requires a subjective, advertent state of mind, in the form of intention or recklessness, on the part of the accused, and this implies conscious choice. As already noted, intention and recklessness must be determined subjectively: the prosecution must prove that the accused acted intentionally or foresaw the possible harmful consequences of his or her conduct. By contrast the test of negligence – the third form of *mens rea* – is objective. When negligence is at issue the prosecution must show that the accused failed to conform to the objective standard laid down by the law. In general, this is done by showing that the accused did not measure up to the standard of the reasonable person in the circumstances. Negligence, in other words, is the failure to foresee the possibility that certain harm will occur as a result of one's conduct in circumstances where a reasonable person would have foreseen that possibility. A person is negligent when he or she does not foresee what he or she ought to foresee. To put it otherwise, the issue of negligence arises where there is a duty of care, and a person fails to exercise such care, skill, or foresight as a reasonable person in that situation would exercise.

At common law two degrees of negligence have been recognized: simple or civil law negligence and gross negligence. Simple law negligence involves a departure from the standard of care expected of a reasonable person. It involves omitting to do something that a reasonable person, guided by common sense considerations, would do; or doing something that a prudent and reasonable person would not do. It is not a defence in a civil action for the defendant to show that he or she did not foresee the harm if a reasonable person would have foreseen it. On the other hand, what is referred to as 'gross negligence' involves a major

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unjustifiable … Recklessness always postulates foresight of consequences, together with an intention to continue the course regardless of the consequences."

departure from the standard of care expected from a reasonable person.[50] Insofar as criminal law is concerned, the general rule has been that, with respect to true crimes, simple or civil law negligence is not sufficient as a basis of criminal liability. Only when negligence is gross, criminal liability may be established.[51] As already noted, under the new s 150A of the New Zealand Crimes Act 1961, covering the legal duties specified in ss 151-157 of the Act, the accused must now be shown to have been grossly negligent before he or she can be held criminally liable.[52]

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[50] As Professor Hart has remarked, "negligence is gross if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take." "Negligence, mens rea, and criminal responsibility", in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) 136 at 149.

[51] This is expressed in the following classic statement of Lord Hewart in *R v Bateman* (1925) 19 Cr App R 8: "In order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state, and conduct deserving of punishment." In New Zealand, it is recognized that with respect to certain traffic offences the lower, civil standard of negligence applies. In any event, one needs to keep in mind that whether 'gross' or 'simple' negligence is required will depend upon the statutory definition prescribing the relevant duty.

[52] In the English case of *R v Adomako* [1995] 1 AC 171, the accused, an anesthetist, failed to perform basic monitoring of his patient during an operation and then failed to react properly to address a problem of inadequate ventilation until too late. As a result, the patient died. The Court of Appeal considered the question of the true legal basis of the offence of involuntary manslaughter by breach of duty. This was said to be gross negligence as opposed to recklessness. Gross negligence was defined as proof of any of the following states of mind: (a) indifference to an obvious risk of injury to health; (b) actual foresight of the risk coupled with the determination nevertheless to run it; (c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction; (d) inattention or failure to avert to a serious risk which goes beyond 'mere inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address. Adomako's case was then

Section 158 of the Crimes Act 1961 provides that:

Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

There are several related provisions in the Crimes Act, which may have a bearing on the issue of whether the conduct in question can be regarded as the killing of a human being by another for the purpose of section 158. In practice, New Zealand courts have usually followed English common law reasoning on questions of causation. Reference should be made here to Section 160 (2) of the Crimes Act. This section provides, among other things, that:

Homicide is culpable when it consists in the killing of any person –
(a) By an unlawful act;[53]
(b) By an omission without lawful excuse to perform or observe any legal duty; or
(c) By both combined.

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referred to the House of Lords which upheld the accused's conviction and agreed that gross negligence was the test of criminality. According to Lord Mackay, to determine whether negligence is gross one would need to consider "the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

[53] The term 'unlawful act' denotes a criminal offence and is identified as a breach of any statutory enactment, regulation, or by-law. See Crimes Act 1961 (NZ) s 2(1). For an act to be deemed unlawful there must be, (a) the mental state (*mens rea*) required to render it an offence, and (b) the relevant act must be done without lawful justification or excuse.

Furthermore, negligent conduct that causes injury, in the sense of actual bodily harm (Crimes Act 1961, s.2(1)), has long amounted to an offence in New Zealand. Section 190 of the Crimes Act 1961 provides that:

Every one is liable to imprisonment for a term not exceeding 3 years who injures any other person in such circumstances that if death had been caused would have been guilty of manslaughter.

In New Zealand law, it is not only negligent conduct that results in death or injury which is criminally punishable. The offence of 'criminal nuisance' in section 145 of the Crimes Act 1961 provides that:

(1) Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such an act or omission being one which he knew would endanger … the life, safety, or health of any individual.

Unlike the offences dealing with causing death by negligence, or causing injury by negligence, this endangerment offence requires proof of a subjective state of mind, i.e., knowledge of the endangerment.[54]

Where a health professional is implicated in the death of a patient, criminal liability may be based on either an 'unlawful act' or the failure 'to perform a legal duty'. More specifically, if the health professional has failed to comply with a duty imposed by section 155 or section 156 of the Crimes Act, and death has followed as a result, then culpable homicide will have occurred. In such a case, there will have been an omission without lawful excuse to perform or observe any legal duty, as section 160 (2) (b) prescribes. Given that the conduct in question does not

[54] On s. 145 consider *R. v. Turner* (1995) 13 C.R.N.Z. 142 (N.Z.C.A.).

meet the definitional requirements of murder (Crimes Act 1961, ss. 167-168), the culpable homicide will be manslaughter (Crimes Act 1961, s. 171) for which the maximum punishment provided is imprisonment for life (Crimes Act 1961, s. 177).

In *McDonald*[55] the accused, an anesthetist, was charged with manslaughter, following the death of an eleven-year-old boy, who died as a result of being deprived of oxygen during an operation for acute appendicitis in a small public hospital in 1981. The patient was to have been given a mixture of two-thirds nitrous oxide and one-third oxygen. However, the accused turned the wrong control knob, as a result of which the patient was given carbon dioxide instead of oxygen. It was alleged that the accused then failed to discover and correct the mistake and that he did not take appropriate action once he realized that something had gone wrong. The fact that the accused, who had commenced work at the hospital shortly before the incident at issue, was unfamiliar with the theatre and the relevant equipment appeared to have been an important contributing factor. In fact, the accused had not been informed that the operation was to take place in the theatre that was in fact used (he said that he had checked the equipment in a different theatre), and he was not aware that there was a carbon dioxide cylinder on the machine that he was using. His colour blindness may also have played a part, as the colour-coded tubes used would have looked much the same to him under fluorescent light. In his summing-up at the end of the trial, Roper J. instructed the jury that doctors have a duty to act with the care and skill of a reasonably competent practitioner, in this case a specialist anesthetist. He said that this does not require absolute perfection, but reasonable care and skill taking

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[55] *R v McDonald*, 19 November 1982, T. 24/82, High Court, Christchurch. The full report of the trial appeared each day in the Christchurch newspaper *The Press*, 9-12 and 16-20 November 1982.

account of all the circumstances of the case. After several hours of deliberation, the jury found the accused guilty, but added a recommendation that leniency be shown. The judge fined the accused $2500 and ordered him to pay $2000 costs.

However, the degree to which the accused must have deviated from the accepted standard of care has seen considerable change in recent years. The case of *Yogasakaran*[56] was a major catalyst for this change. In this case the accused, an anesthetist, was charged with manslaughter after the death of a patient who had undergone gall-bladder surgery at a New Zealand provincial public hospital in 1987. After the operation and while the patient was still under general anaesthesia, the patient suddenly developed breathing problems. The accused decided to inject the patient with a drug known as Dopram. He took a drug container from a drawer marked 'Dopram' and, without checking the label on the container, injected its contents into the patient. Unfortunately, the drug he injected was not Dopram but Dopamine. The container of that drug was correctly labeled but had been put in the wrong drawer. As a result of being given the wrong drug the patient sustained fatal physiological stresses and died shortly later. The jury in the High Court at Hamilton found the accused guilty of manslaughter on the grounds that a reasonable anesthetist would be expected to check the label on the drug he was about to use.[57] *Yogasakaran* is an instance of ordinary or civil law negligence, which, under the law that prevailed at the time of that case, was sufficient to support a conviction for manslaughter.[58] Unsurprisingly, there was widespread

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[56] *R v Yogasakaran* [1990] NZLR 399.

[57] Although no penalty was imposed, the Court of Appeal subsequently held that the jury were entitled on the evidence to find as they did, and the Privy Council refused leave to appeal.

[58] *Yogasakaran* can be contrasted to the Canadian case of *R v Giardine* (1939) 71 CCC 295. In the latter case, the accused, a surgeon, administered the wrong drug without checking the label on the packaging. Although he was not acting under urgency and had ample time to read the label, the court adopted the position that gross negligence manslaughter was not

unease among the medical profession in New Zealand and in 1995, after much lobbying,[59] the Minister of Justice requested Sir Duncan McMullin, a retired justice of the Court of Appeal, to examine and report on whether the standard of care applicable under ss. 155 and 156 of the Crimes Act should be amended. Following an in-depth inquiry, the judge recommended that the law be brought into line with that of the United Kingdom, Canada, and Australia, by making gross negligence essential to criminal liability for breach of any of the duties listed in the Crimes Act. Although the recommended changes would apply to all dangerous activities, it has submitted that the strict rule followed in *Yogasakaran* caused special difficulties in a medical context as it tended to encourage the avoidance of justified but risky surgery and might even discourage some medical professionals from practicing in New Zealand. The recommendations in the McMullin Report were implemented by the Crimes Amendment Act 1997 mentioned earlier. As a result of this development, liability for manslaughter by failure to perform a legal duty now required evidence of a 'major departure' from the standard of care expected of a reasonable person.[60] Since 2012, the same test also applies in cases where manslaughter by an unlawful act is based on proof of negligence. This

established. See on this case Collins, D., "New Zealand's Medical Manslaughter" (1992) 11(2) *Med Law* 221 at 223.

[59] Reference should be made here to the sustained and effective lobbying of a coalition of medical bodies, the Medical Law Reform Group. The Medical Law Reform Group emerged as a direct result of police investigations and the prosecution of some health professionals. It had as its sole focus "the objective of improving the medico-legal situation concerning inappropriate criminal prosecutions of doctors from the type of error inherent in medical work." See A. Merry, A., et al., "Special Report: Crimes Act", (1994) 42 *Newsletter New Zealand Society of Anesthetics* (4), 9.

[60] This change in the law is illustrated in the New Zealand Court of Appeal's decision in *R v Powell* [2002] 1 NZLR 152. In this case the court held that the 'major departure' test is applicable not only to manslaughter by omission to perform a legal duty but also to manslaughter by an unlawful act involving either carelessness or negligence.

brings negligent acts or omissions under the same umbrella where there exists a duty of care.

In *Hamer*,[61] the defendant, a former nurse, was charged with manslaughter after his wife's death. His wife had consumed a fatal amount of a drug administered by the accused, who failed to call an ambulance until several hours later, despite being aware of his wife's grave condition and the high risk of further complications. The victim died from brain damage caused by oxygen deprivation from taking the drug. The accused knew of the antidote to the drug but failed to inform the ambulance staff of this when they arrived. The Court of Appeal confirmed that the gross negligence threshold test was to be assessed by the jury by reference to what a reasonable person would have done in the circumstances. Although the Court adopted the view that the test is objective and that, therefore, personal characteristics cannot be engrafted onto the reasonable person, they did consider the accused's medical knowledge as directly relevant to determining what he could reasonably foresee at the time of the incident. In other words, the standard to which the accused was held in this case was that of a reasonable person in possession of his knowledge and expertise as a nurse. This accords with the approach adopted in a number of United Kingdom cases, such as *Adomako*,[62] and New Zealand cases such as the above-mentioned *Yogasakaran*, in which the courts considered the reasonable doctor and the reasonable anesthetist respectively. The application of this standard demonstrates the narrow limits of what the courts will allow to modify the reasonable person test.[63]

Although there have been a very small number of prosecutions of medical practitioners in New Zealand since the 1997 legal reforms, the use of the criminal

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[61] *R v Hamer* [2005] 2 NZLR 81.

[62] *R v Adomako* [1995] 1 AC 171.

[63] See also the Canadian case of *R v Creighton* (1993) 105 DLR (4th) 632 (SCC).

law in the context of medical practice is now an increasingly rare event.[64] However, health professionals are encouraged to report any unintended or unexpected events to the Health Quality and Safety Commission, whose tasks include reviewing events and sharing lessons learned to improve the quality and safety of medical care. The virtual abandonment of criminal prosecutions for medical manslaughter in New Zealand reflects the fact that most patient advocacy groups, lawyers and medical professionals are now agreed that the criminal law and justice system should only be resorted to in cases of intentional wrongdoing or recklessness.

Concluding Remarks

Although the sentences passed on the health professionals who have been found guilty of manslaughter have been relatively lenient, the fear of criminal prosecution have caused many New Zealand doctors to resort to 'defensive medicine' – a term which is used to include refusals to operate as well as the taking of additional steps in an attempt to avoid criminal liability. Thus, it has been noted that the fear of a manslaughter prosecution has resulted in doctors working in small rural hospitals being more cautious about attempting some operations. There is also a suggestion that doctors were reluctant to operate on patients who were at substantial risk of dying during or shortly after an operation. It should be noted here, however, that refusing to operate on such patients would

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[64] See on this issue: Paterson, R., "From Prosecution to Rehabilitation: New Zealand's Response to Health Professional Negligence" in D Griffiths & A Sanders (eds), *Bioethics, Medicine and the Criminal Law* (vol 2 CUP, Cambridge 2013) 244; Skegg, P., "Medical Acts Hastening Death" in P. Skegg & R. Paterson (eds), *Health Law in New Zealand* (Thomson Reuters, Wellington 2015), 616.

not always have avoided the risk of a criminal prosecution, as health professionals are under a statutory duty to provide their patients with the necessaries required, under s. 151 of the Crimes Act 1961. Of special importance has been the amendment of the Crimes Act 1961 introduced by the Crimes Amendment Act 1997. As previously noted, the new s.150A provides that a person is criminally liable for omitting to discharge or perform a legal duty or neglecting a legal duty only if, in the circumstances of the particular case, the omission or neglect constitutes a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances. As a result of this amendment, it is no longer possible for doctors and other health professionals to be convicted of manslaughter if death is caused only by simple or ordinary negligence. Although the duty-imposing provisions remain unchanged, a conviction for manslaughter now requires proof that the breach of duty was ‘a major departure’ from the standard of care expected of a reasonable person to whom the duty applies in the circumstances. Most commentators agree that the New Zealand experience provides no support for the increased reliance on the criminal law as a response to concerns about possible instances of medical negligence and therefore have welcomed the amendment of the Crimes Act as a step in the right direction.